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SUBJECT: BRAZIL REJECTS SOFA REQUEST FOR BRAZILIAN AIR FORCE ANNUAL
TRANSPORT AVIATION MEETING

REF: A) STATE 100160

B) 05 BRASILIA 2538

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1. Poloff delivered reftel's talking points and draft dip notes, July 5, to Virginia Toniatti, the MFA's General Coordinator Against Transnational Crime (COCIT). In response to the draft note and Poloff's assertion that the USG would like to conclude a long-term SOFA agreement with Brazil, Toniatti declared that COCIT had already answered and denied similar requests in previous years, most recently in July and September of 2005. She added that there had been no alteration in the GoB's legal position or in the relations between the U.S. and Brazil that would modify the Brazilian response. Although the GoB could not exchange notes utilizing the proposed language, COCIT did agree to afford U.S. military personnel the same privileges as in previous exercises. If necessary, the GoB will transmit a new note, similar to diplomatic note 79 from September 2005, confirming these protections.

2. Text of Dip Note 79 (ref B)

COCIT / DEUC / 079 / PEXT-BRAS-EUA - September 9, 2005

a. The Ministry of Foreign Affairs presents its compliments to the Embassy of the United States of America and has the honor to refer to Dip Note #250 sent by the U.S. Embassy on 26 July 2005, regarding the concession of additional privileges and immunities to U.S. military personnel participating in joint military exercises in Brazilian territory. The Ministry regrets not to be in agreement with all the terms of the referred note and reminds the Embassy that the subject has been under discussion, via exchange of correspondence with the Embassy, since September 2002, and the last manifestation from the Brazilian Government in this respect was stated in Dip Note #050, dated 4 July 2005.

b. The Ministry is not in the position to provide additional guarantees to the status of privileged to U.S. military personnel. The GOB understanding is that the concession of additional immunities of jurisdiction to U.S. personnel involved in joint exercises in Brazil is subject to the terms established by the 1961 Vienna Convention on Diplomatic Relations, and based on the principle of juridical equality of states, and on the constitutional principle of isonomy among nationals and foreigners.

c. As stated in paragraph 4 of the referred note #50, the Brazilian Law accepts the rules of International Law that establishes that foreign military vessels and aircrafts enjoy extraterritoriality. In this sense, crimes committed aboard these vessels and aircrafts

are not subject to the Brazilian legislation. In the same way, crimes committed in Brazilian territory by foreign military personnel, while fulfilling their duties, are not subject to Brazilian jurisdiction, but to the jurisdiction of the perpetrator's country of nationality. Brazilian courts, however, have jurisdiction over crimes committed by foreign military personnel, in Brazilian territory, when they are not in the fulfillment of the duties related to joint military exercises with the Brazilian Armed Forces. In this last case, Brazilian courts would act independently of any consultation between the two governments, based on constitutional principles that establish the separation of powers in the Republic.

d. Under these conditions, the Ministry stresses to the Embassy that, while organizing joint military exercises in the Brazilian territory, the officials involved must take these facts referred above into consideration.

13. Text of Dip Note 50 referred to in paragraph 2.a

COCIT / DEUC / SPD / 050 / PEXT-BRAS-EUA - July 4, 2005

a. The Ministry of Foreign Relations compliments the Embassy of the United States of America and has the honor to refer to Diplomatic Note number 181 from the U.S. Embassy, dated June 13, 2005, about the concession of privileges and additional immunities, for the designation of U.S. militaries to participate in military exercises together with the Brazilian Forces in Brazil. The Ministry agrees that the issue has been object of exchange of notes with the U.S. Embassy since September, 2002, and that the position of the Brazilian Government was transmitted to the U.S. Government on notes number 91 (10-04-2002), 08 (02-04-2005) and 15 (03-08-2005).

b. The Brazilian Government has no means to assure the U.S. militaries any additional guarantees as a status of privilege, as an example of the personnel condition as temporary diplomatic mission, based in the U.S. Liaison Office in Brazil. The concession of equivalent diplomatic status granted to administrative and technical

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personnel to the Embassy to U.S. militaries involved in joint exercises with Brazil, shall necessarily fall into what the 1961 Vienna Convention states about Diplomatic Relations (noted in articles 29, 31 and 37)

c. The Ministry considers that the terms the request was made would hinder that such concession be in accordance with the jurisdiction of National courts to judge as crimes of U.S. militaries in Brazil, according to the Brazilian Penal Law. This would also go against the Principle of Equal Jurisdiction of States, the Constitutional Principle of Isonomy between Nationals and Foreigners and the Brazilian Practice in similar cases.

d. The Ministry has reiterated to the Embassy that, up to this moment, there has not been any agreements between Governments of both countries regarding this matter and that the Brazilian Law agrees with the International Law, which foreign military ships and aircrafts avail of extraterritoriality. Having mentioned this, crimes committed on such ships and aircrafts are not object to the Brazilian Law. In addition, crimes committed on the Brazilian grounds by foreign military agents while in their duties are not submitted to the Brazilian jurisdiction, but the State of the incumbent's nationality. The Brazilian jurisdiction acts, however, in cases of crimes committed by foreign militaries if they are not in duties related to military exercises with the Brazilian Authorities.

e. The Ministry reminds the Embassy that the Brazilian and the U.S. Army have been working on joint military exercises on Brazilian grounds in a smooth and uninterrupted way for almost half century. The Brazilian Government has made sure that basic conditions to the full development of their activities be guaranteed to the participants of such exercises. The Ministry notes the existence of the joint exercise "PKO South" on Brazilian soil and the cancellation of the "Patriot Angel" exercise in common agreement between Air Force authorities of both countries.

f. The Ministry transmits to the Embassy that the Brazilian Government expects that The Brazilian and the U.S. Forces continue with their joint military exercises, such as the upcoming edition of UNITAS. To stress so, the Ministry reiterates the position of the Brazilian Government that such exercises be developed in the same terms as previous exercises regarding the immunity of jurisdiction to foreign militaries (terms previously mentioned in paragraph 4). Brazil does not consider that any fact or initiative have occurred in order to justify changes in the relations between Brazilian and U.S. militaries or any cancellation of exercises that have been developed for years in an excellent prosperous atmosphere.

g. Finally, The Ministry expresses to the Embassy that communications regarding this matter, in order to be considered official, shall be directed to Itamaraty, the authority with proper responsibilities, and the body that handles grants of privileges and immunities to foreign officers who visit the country.

WILLIAMSON